APR 4 2001

(6)

Supreme Court, U.S.
FILED
APR 4 2001
CLERK

No. 00-507

In the

Supreme Court of the United States

CHICKASAW NATION,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, AND BOIS FORTE BAND OF CHIPPEWA IN SUPPORT OF PETITIONER CHICKASAW NATION

JAMES M. SCHOESSLER
Counsel of Record
HENRY M. BUFFALO, JR.
MARK A. ANDERSON
JACOBSON, BUFFALO, SCHOESSLER, & MAGNUSON, LTD.
Suite 246, Iris Park Place
1885 University Ave. West
St. Paul, Minnesota 55104
(651) 644-4710

DENNIS J. PETERSON
Tribal Attorney,
Fond du Lac Band
1720 Big Lake Road
Cloquet, Minnesota 55720
(218) 878-2607

Attorneys for Amici Curiae

2001 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

18 pp

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CONGRESS HAS GIVEN DIRECTIONS ABOUT HOW AMBIGUITIES IN THE IGRA SHOULD BE RESOLVED 4

II. THE IGRA SHOULD BE INTERPRETED IN LIGHT OF THE UNDERLYING INTENT OF CONGRESS TO TREAT TRIBES AND STATES AS EQUALS 7

III. EVEN WITHOUT RESORT TO THE CANONS OF CONSTRUCTION OR LEGISLATIVE HISTORY, IT IS REASONABLE TO INTERPRET THE IGRA AS EXEMPTING TRIBES FROM FEDERAL WAGERING TAXES 9

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Federal Cases

American Tobacco Co. v. Patterson 11
456 U.S. 63 (1982)

Bailey v. United States 11
516 U.S. 137 (1995)

Bryan v. Itasca County 6
426 U.S. 373 (1976)

Choate v. Trapp 6
224 U.S. 665 (1912)

County of Oneida v. Oneida Indian Nation 6
470 U.S. 226 (1985)

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation 6
502 U.S. 251 (1992)

Crandon v. United States 9
494 U.S. 152 (1990)

Fidelity Federal Savings & Loan Association v. de la Cuesta 11
458 U.S. 141 (1982)

Little Six, Inc. v. United States 2
210 F.3d. 1361 (Fed. Cir. 2000)

Minnesota v. Mille Lacs Band of Chippewa Indians 6
526 U.S. 172 (1999)

Montana v. Blackfeet Tribe of Indians 6
471 U.S. 759 (1985)

Squire v. Capoeman 6
351 U.S. 1 (1956)

Tulee v. Washington 6
315 U.S. 681 (1942)

Federal Statutes

Indian Gaming Regulatory Act, 28 U.S.C. § 2701
et seq. ..... *passim*

Indian Gaming Regulatory Act, 28 U.S.C. § 2719(d)
IGRA § 20(d) 3, 6, 9-14

Internal Revenue Code, 26 U.S.C. § 4401 1

Internal Revenue Code, 26 U.S.C. § 4411 1

Internal Revenue Code, 26 U.S.C. §§ 4401-4424
(Chapter 35) 3, 10-13

Federal Legislative Materials

133 *Cong. Rec.* (February 19, 1987) 8

134 *Cong. Rec.* (September 15, 1988) 9

134 *Cong. Rec.* (September 26, 1988) 5

S. Rep. No. 446. 100th Cong., 2d Sess. (1988) 5, 7

INTEREST OF AMICI CURIAE[1]

The *amici curiae* are three federally recognized Indian tribes in Minnesota. They support the position of the Chickasaw Nation in the present case. All three *amici* tribes have sold pull-tabs for many years in conjunction with tribally-run casinos. The pull-tab sales have been made in accordance with applicable court rulings and the federal Indian Gaming Regulatory Act, 28 U.S.C. § 2701 *et seq.* (hereafter, "IGRA"). The tribes sold pull-tabs in the belief that they were not required to pay the federal taxes imposed under the Internal Revenue Code, 26 U.S.C. §§ 4401 and 4411 with regard to pull-tab wagers.

During the early years of the tribal pull-tab sales, the Internal Revenue Service gave no indication that it believed that the taxes under §§ 4401 and 4411 were applicable to tribal operations. However, after several years of inaction, the Internal Revenue Service assessed taxes, penalties, and interest against these tribes for past pull-tab sales.

The *amici* tribes paid the assessments for certain periods, filed administrative requests for refunds (which were denied), and filed an action in the United States District Court for the District of Minnesota challenging the denial of refunds. The legal rationale underlying that district court action is the same rationale that is at the heart of the present case before this Court. The proceedings in the *amici's* action in federal district court are being held in abeyance pending this Court's decision. At stake for the *amici* tribes is more than $400,000 of tribal funds.

---

[1] Counsel for the Petitioner and counsel for the Respondent have consented to the filing of this *amici curiae* brief. The letters of consent have been filed along with the copies of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

The *amici* tribes also submitted a brief to the United States Court of Appeals for the Federal Circuit in support of the Shakopee Mdewakanton Sioux Community in *Little Six, Inc. v. United States*, 210 F.3d 1361 (2000), a case which also involved the same issues as are in the present case. Additionally, the *amici* tribes submitted a brief to the United States Court of Appeals for the Tenth Circuit on the Chickasaw Nation's petition for rehearing in earlier proceedings in the present case.

The *amici* tribes' participation in the present case is appropriate because of 1) their continuing involvement in similar litigation in federal district court, 2) their potential monetary loss if this Court makes a decision adverse to their claims, 3) their participation in the *Little Six* case and the earlier proceedings in the present case, 4) their interest in the continuing viability of the long-established Indian canons of construction, and 5) their interest in receiving the full benefits of what Congress intended when it passed the IGRA.

In this brief the *amici* tribes wish to emphasize to the Court 1) that Congress has spoken to the issue of potential ambiguities in the Act; 2) that Congress assumed throughout deliberations on the Act that tribes and states were equal sovereigns to be treated equally by the federal government; and 3) that it is reasonable to read the Act as granting tribes the same tax treatment as states even without resort to the Indian canons of construction.

SUMMARY OF ARGUMENT

If the Court concludes that there are ambiguities in the IGRA with regard to the application of federal wagering taxes to tribal enterprises, Congress has indicated its intent as to how those ambiguities should be resolved. The Senate Committee Report on S. 555 (the bill that became the IGRA) stated very clearly the expectation that ambiguities will be

resolved in the manner that is most favorable to tribal interests. When the bill was explained on the floor of the House of Representatives, Chairman Udall of the House Committee on Interior and Insular Affairs declared a similar expectation. Normally, courts would be expected to apply the Indian canons of construction to any federal statute relating to Indian affairs. However, the legislative history of the IGRA makes it clear that Congress explicitly intended those canons to be applied to any ambiguities in that Act. The United States argues that the Indian canons of construction cannot be applied to the provisions of the IGRA relating to the treatment of tribes as states for wagering tax purposes. The United States' arguments cannot survive either 1) the expressed intent of Congress that the Indian canons of construction be used to interpret any ambiguities in the IGRA or 2) the common law requirement that the Indian canons of construction must be used generally to interpret statutory ambiguities.

Throughout the legislative history of the IGRA are indications that Congress intended to treat tribes and states as equals. Tribal gaming operations were viewed in the same context as state lotteries—both provide funding for essential governmental programs serving the general welfare. To find that federal wagering taxes do not apply to state gaming operations but do apply to tribal gaming operations would violate the understanding and intent of Congress. The IGRA should be interpreted in a manner that recognizes the congressional acknowledgment of tribes and states as equal sovereigns.

It is entirely reasonable to read §20(d) of the IGRA (25 U.S.C. § 2719(d)) as exempting tribal operations from federal wagering taxation in the same manner that state lotteries are exempted. Such a reading is consistent with the wording of §20(d) and is consistent with the underlying purposes of the IGRA. By specifically naming chapter 35 of the Internal Revenue Code as one of the provisions of the Code that apply

to tribal gaming operations in the same manner as they apply to state gaming operations, the IGRA exempts tribal operations from wagering taxation. The United States tries to read the reference to "chapter 35" out of the law. However, the proffered United States' interpretation eliminates specific congressional language and makes little sense in the context of the Act and its history. The United States also claims that a wording change between early and late drafts of S. 555 (the bill that became the IGRA) shows an intent to impose wagering taxes on tribal operations. However, there is no evidence supporting the United States' claim. There is no legislative history that shows that anyone thought there was any significance to the language change, and the author of S. 555 specifically contradicts the assertions of the United States.

ARGUMENT

I. CONGRESS HAS GIVEN DIRECTIONS ABOUT HOW AMBIGUITIES IN THE IGRA SHOULD BE RESOLVED.

Congress was clear in its instructions to the judiciary about how the provisions of the Indian Gaming Regulatory Act of 1988 were to be interpreted. Representative Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, presented S. 555 (the bill that ultimately became the IGRA) to the House of Representatives for passage. At the beginning of his remarks urging the House to pass the bill, Udall pointedly explained:

> Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. *I would expect that the Federal courts, in any*

> *litigation arising out [sic] this legislation, would apply the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.*

134 *Cong. Rec.* H8153 (Sept. 26, 1988) (emphasis added).

This same instruction was memorialized in the Senate Committee Report on S. 555 (the only formal Committee Report on the IGRA). When discussing the federal courts' role in resolving disputes about state-tribal compacts under the Act, the Senate Committee Report stated:

> The Committee recognizes that this may include issues of a very general nature and, and course [sic], *trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests* consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

S. Rep. No. 446, 100th Cong., 2d Sess. 15 (1988)(emphasis added).

These statements pointedly indicate the expectation of—and indeed instruction from—Congress about how the IGRA should be interpreted when litigation over its provisions inevitably arrives at the federal courts. Congressional expectation in this regard was not unique. Judicial canons of construction for over 100 years have directed that congressional acts be interpreted to the benefit of Indians and their governments. What is unique was the specific highlighting of these canons in the Committee Report on S. 555 and in the presentation of the bill to Congress by the chairman of the committee from which the bill came.

Even in the absence of instructions from Congress, there should be little argument as to whether the canons of construction can be used in the present case. The canons are well established and have been applied from the 1800's[2] to the present.[3] Their formulations have been many[4], and since they will be discussed extensively by others in the present case, *amici* tribes will not dwell on them.

The *amici* tribes do want to emphasize one point, however. To the extent there is any doubt about the canons' applicability here, that doubt is removed by the specific congressional intent and direction that they shall be used. The United States may argue that the canons should be changed for this situation, but the intent of Congress is that the canons are the tools which the courts should use in interpreting the Indian Gaming Regulatory Act. To ignore the canons when interpreting the "treatment as a state" language of § 20(d) of the IGRA (25 U.S.C. § 2719(d)) is to ignore congressional intent. If there is any ambiguity about what § 20(d) of the IGRA means, that ambiguity must be resolved in the tribes' favor.

---

[2] "This rule of construction has been recognized, without exception, for more than a hundred years...." *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

[3] "We have held that Indian treaties are to be interpreted liberally in favor of the Indians...and that any ambiguities are to be resolved in their favor...." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999).

[4] *See, e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985), *reh denied* 471 U.S. 1062 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Tulee v. Washington*, 315 U.S. 681 684-685 (1942).

II. THE IGRA SHOULD BE INTERPRETED IN LIGHT OF THE UNDERLYING INTENT OF CONGRESS TO TREAT TRIBES AND STATES AS EQUALS.

The legislative history of the IGRA is replete with comments to the effect that a prime purpose of the Act was to allow tribes to earn governmental dollars for various public programs, *just as states are able to do with state-run lotteries*. The Senate Report on S. 555 stated that:

> Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, *like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible*. For various reasons, not all tribes can engage in profitable gaming operations. However, for those tribes that have entered into the business of business, the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.

S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988)(emphasis added). The Report goes on to describe the tribal interests to be served by the IGRA as follows:

> A tribe's governmental interests include *raising revenues to provide governmental services for the benefit of the tribal community and reservation residents*, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-

> determination, and regulating activities of persons within its jurisdictional borders.

Id. at 13 (emphasis added).

Senator Inouye, when introducing the bill to the Senate, stated that:

> Bingo revenues have enabled tribes, *like lotteries and other games have done for State and local governments,* to provide a fuller range of government services to their members than would otherwise have been possible.

133 *Cong. Rec.* S2242 (Feb. 19, 1987)(emphasis added).

Congress viewed the IGRA as enabling tribes to do the same things that states do with lottery revenue. It therefore is logical and reasonable to conclude that Congress intended to treat tribe-run gaming the same way that the federal government treats state-run gaming for federal tax purposes. Throughout its consideration of the IGRA, Congress analogized tribal gaming to state gaming. That analogy should be recognized and confirmed by this Court. The IGRA should be interpreted in a way that treats tribal pull-tab operations the same as state lotteries for wagering tax purposes.

As further evidence of Congress' desire to treat tribes the same as states for gaming purposes, the Senate Committee Report and the congressional debates on the IGRA are filled with references to tribes as sovereigns that are in the same general category as states. The Senate Committee Report on S. 555 referred to the tribes and states as "equal sovereigns", both having "significant government interests in the conduct of Class III gaming." *S. Rep. No. 446*, 100th Cong., 2d Sess. 13 (1988). During the congressional consideration of the IGRA, Senator Inouye, on behalf of the Senate Select

Committee on Indian Affairs, consistently referred to Indian tribes and states as "equal sovereigns" that negotiate "to create a consensual agreement between the two sovereign governments." 134 *Cong. Rec.* S12650 and 12651 (Sept. 15, 1988). Senator Evans, Select Committee on Indian Affairs member, classified states and tribes as "two sovereigns" that are "on equal terms and at equal strength." *Id.* at S12654.

In its formulation of and consideration of the IGRA, Congress understood that states and tribes were in the same position with regard to their interest in the governmental conduct of gaming. It is only logical to conclude that this understanding also applied to the taxation of government gaming operations. There is no reason to suppose that Congress intentionally meant to retreat from its "equal sovereigns" analysis solely on the issue of federal taxation. The interpretation of IGRA §20(d) as treating tribes the same as states for wagering tax purposes is the interpretation that is most consistent with how Congress viewed the tribes during the consideration of the IGRA. It is the interpretation that most comports with the design of the statute as a whole and to its object and policy. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

III. EVEN WITHOUT RESORT TO THE CANONS OF CONSTRUCTION OR LEGISLATIVE HISTORY, IT IS REASONABLE TO INTERPRET THE IGRA AS EXEMPTING TRIBES FROM FEDERAL WAGERING TAXES.

The heart of the present case is the interpretation of section 20(d) of the IGRA (25 U.S.C. § 2719(d)). As passed, that section reads as follows:

> (1) The provisions of the Internal Revenue Code of 1986 (*including* sections 1441, 3402(q), 6041, and

> 6050I, and *chapter 35* of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations.*
>
> (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

Emphasis added.[5]

Chapter 35 of the Internal Revenue Code (hereafter, "Code") is specifically referenced as one of the provisions under which Indian gaming operations are to be treated the same as state operations. Chapter 35 is the Code chapter that imposes federal wagering taxes, but that chapter exempts states from such taxes for wagers placed in state-conducted lotteries. When Congress specifically referenced "chapter 35," the most reasonable reading is that Congress meant for tribes to receive the same tax exemption that chapter 35 gives to states.

The United States, however, has urged the courts to read the phrase "chapter 35" out of the IGRA. The United States suggests that tribes are to be treated as states only for purposes relating to the withholding of taxes with respect to winnings from gaming. The problem with that interpretation

[5] The United States Code codification substitutes "title 26" for the original "Internal Revenue Code of 1986.

is that neither chapter 35 nor section 6050I (another section mentioned in the IGRA parenthetical) have anything to do with winnings from gaming. The suggested interpretation of the United States effectively wipes "chapter 35" and "section 6050I" from the statute. That is contrary to good sense and contrary to the accepted rules that all parts of a statute are to be given effect if possible, and that untenable distinctions within statutes should be avoided. *See, e.g., Bailey v. United States*, 516 U.S. 137, 145 (1995); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 163 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

It is reasonable to read IGRA's reference to chapter 35 as a straightforward statement that tribes are to be treated as states for federal wagering tax purposes. That is the reading urged by *amici* tribes. Such a reading creates less of a statutory construction problem than the proposal urged by the United States, and is a fair reading of the Act.

The fact that the United States and the court below struggle to deal with IGRA's specific reference to chapter 35 of the Code is a strong indication that the statute, if not appropriately clear, is at least ambiguous. If it is ambiguous, the congressional directive and the canons of construction direct that the ambiguity should be resolved in favor of the tribes. In other words, the reference to chapter 35 should be given full effect and the tribes should be exempted from federal pull-tab taxes in the same manner as states.

The United States also has argued that a wording change that occurred between an early version of S. 555 and the final version demonstrates a clear congressional intent to apply federal pull-tab taxes to tribes. The original version of S. 555 had language which used the word "taxation" in the § 20(d) treatment of tribes as states. The final version essentially substituted the term "chapter 35" for the word "taxation." The United States argues that this change was profound proof that Congress decided to apply the pull-tab taxes to tribes.

There are at least three reasons why the United States' argument is far less persuasive than it asserts.

First, it is at least as likely that the drafters of the legislation merely *substituted* the "chapter 35" language for the "taxation" language, rather than eliminating the whole concept of treating tribes like states for taxation purposes. There could have been any number of reasons—political, strategic, procedural, or merely stylistic—for the wording change. However, if the drafters really meant to eliminate the treatment of tribes as states for pull-tab tax purposes, it is strange that they inserted the "chapter 35" language in the statute at all.

Additionally, there is absolutely no indication in the committee report or the congressional discussions that a major taxation change had taken place in the bill. Since a large amount of money would have been involved, and since tribes and their sovereignty throughout the United States would have been affected, one would think that at least some reference to the change would appear in the legislative record. Yet there is absolutely nothing of the sort. If the United States is correct that § 20(d) was consciously and carefully redrafted to divide up precise parts of the Code for "treatment as a state" purposes, it truly is odd that there is no reference at all to this alleged parsing in the committee report or congressional testimony.

Finally, with regard to the reading of the IGRA urged by the United States, the Court must give more than passing credence to the opinion of Senator Daniel K. Inouye, the author of S. 555 and chairman of the committee (the Senate Select Committee on Indian Affairs) from which the bill came. When Senator Inouye became aware that the Internal Revenue Service was informing tribes of its intent to impose chapter 35 pull-tab taxes on them, he wrote a letter of objection to IRS Commissioner Fred Goldberg. The letter has

been submitted to the courts below. Among other things, Senator Inouye wrote the following:

> As primary author of the Indian Gaming Regulatory Act, I write to advise you that it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code. Because the purpose of wagers for both tribal and state governments is to provide for the general welfare of their citizens, it was the view of the Congress that to impose a higher rate upon tribal government-conducted gaming activities would be unfair. Accordingly, it was this result that the Congress intended to avoid by including reference to Chapter 35, and stating that, "[t]he provisions of the Internal Revenue Code of 1986 (including...Chapter 35) shall apply to Indian gaming operations conducted pursuant to this Act...in the same manner as such provisions apply to State gaming and wagering operations."

This explanation by the person who was primarily responsible for the creation and passage of S. 555 cannot be ignored. Even if the Court refuses to use the letter as a formal indication of congressional intent, the letter at least should be used to debunk the United States reading of §20(d) of the IGRA. If the wording of S. 555 was deliberately changed in the way the United States alleges, Senator Inouye not only would have been aware of it, he likely would have had to approve it. The recollection of Senator Inouye should be the final factor that puts to rest the United States' argument that S. 555 was changed in order to affirmatively subject tribes to taxation. There simply is no evidence supporting the United

States' opinion about the reason for the language change in S. 555.

CONCLUSION

The Court should interpret the IGRA as Congress likely intended it to be interpreted. The wording of the Act, the intent of the Act, the committee report, and the congressional deliberations all support the reasonableness of the Chickasaw Nation's interpretation of § 20(d) as granting tribes the same treatment as states for federal wagering tax purposes. The IGRA can be interpreted in this way without even resorting to the canons of construction. However, to the extent that there are any ambiguities in the Act, Congress intended that the canons of construction be used to interpret the ambiguities in favor of tribes. With or without the aid of the canons of construction, the IGRA exempts tribal operations from wagering taxes just as state lotteries are exempted.

Respectfully submitted,

JAMES M. SCHOESSLER
Counsel of Record
HENRY M. BUFFALO, JR.
MARK A. ANDERSON
JACOBSON, BUFFALO, SCHOESSLER, & MAGNUSON, LTD.
Suite 246, Iris Park Place
1885 University Avenue West
St. Paul, Minnesota 55104
(651) 644-4710

DENNIS J. PETERSON
Tribal Attorney,
Fond du Lac Band
1720 Big Lake Road
Cloquet, Minnesota 55720
(218) 878-2607

Attorneys for *Amici Curiae*

April 2000